

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WHOLESALE MERCHANT PROCESSING, INC.,)
an Oregon corporation,)

Plaintiff,)

vs.)

ORION COMMUNICATIONS, INC.,)
a Kansas corporation,)

Defendant.)

No. 03:12-cv-02003-HU

**FINDINGS & RECOMMENDATIONS
ON MOTION TO DISMISS**

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HUBEL, Magistrate Judge:

This case involves an autodialer unit the plaintiff Wholesale Merchant Processing, Inc. ("WMP") purchased from the defendant Orion Communications, Inc. ("Orion"). The terms of the sale were memorialized in a document entitled "Orion Communications, Inc. End User License Agreement" (the "Agreement"), signed by the parties on July 21, 2011. A copy of the Agreement is attached as Exhibit A to WMP's Complaint. See Dkt. #1-1. In its Complaint, WMP alleges the autodialer system was defective, and despite repeated attempts to make the system work, Orion ultimately failed to fix the system. WMP sues for breach of contract, breach of the implied covenant of good faith and fair dealing, and rescission. See Dkt. #1, Complaint.

The case is before the court on Orion's motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). Orion bases its motion on a forum selection clause contained in the Agreement, which provides as follows:

(m) Dispute Resolution. This Agreement is made under and will be construed in accordance with the laws of the State of Kansas, other than such laws, rules, regulations and case law that would result in the application of the laws of a jurisdiction other than the State of Kansas. . . . **The parties agree that exclusive venue for any dispute arising under or in connection with this Agreement shall be in the federal district court for the District of Kansas or the state court for the City and County of Olathe, Kansas.** Each party hereby agrees that such courts shall have in personam jurisdiction and venue with respect to such party, and each party hereby submits to the in personam jurisdiction and venue of such courts **and waives any objection based on inconvenient forum.**

Agreement ¶ 9(m), Dkt. #1-1, ECF p. 6 (emphasis added).

1 Despite the existence of a forum selection clause in the
2 Agreement, WMP argues it would be "unreasonable and unjust, under
3 the circumstances," to force WMP to litigate in Kansas. Dkt. #17,
4 p. 1. According to WMP, the autodialer system was shipped to its
5 offices in Oregon, and installed there. When the system failed to
6 work as contemplated, Orion sent an independent contractor to
7 Oregon, to work with WMP in an attempt to rectify the problems.
8 WMP claims it will require testimony from more than twenty wit-
9 nesses in the Portland, Oregon, metropolitan area, and the cost of
10 producing those witnesses in Kansas would be prohibitive. WMP
11 maintains that forcing it to litigate in Kansas "would effectively
12 deprive WMP of its ability to litigate this matter." *Id.*, p. 3
13 (relying on *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509,
14 515 (9th Cir. 1988); *Mittendorf v. Stone Lumber Co.*, 874 F. Supp.
15 292 (D. Or. 1994)). In the alternative, WMP argues that because it
16 is justified in rescinding the Agreement, the forum selection
17 clause is unenforceable, and this court should exercise juris-
18 diction over Orion based on Orion's contacts with Oregon. *Id.*,
19 pp. 4-6.

20 Orion responds that WMP's claims of *forum non conveniens* do
21 not meet the "very high" standard required for invalidation of the
22 forum selection clause. Dkt. #19, p. 3 (citing *Holck v. Bank of*
23 *N.Y. Mellon Corp.*, 769 F. Supp. 2d 1240, 1251 (D. Haw. 2011)
24 ("trial in the contractual forum must be so gravely difficult and
25 inconvenient that the plaintiff will for all practical purposes be
26 deprived of [its] day in court," quoting *M/S Bremen v. Zapata Off-*
27 *Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 1917, 32 L. Ed. 2d 513
28 (1972)). Orion argues WMP's claim that its rescission of the

1 Agreement renders the forum selection clause unenforceable "puts
 2 the cart before the horse." *Id.*, p. 5. Orion asserts the question
 3 of whether Orion breached the Agreement must be litigated first,
 4 and that litigation should take place in Kansas. *Id.* (citing
 5 *Premier Jets, Inc. v. Honeywell Int'l, Inc.*, 2008 U.S. Dist. LEXIS
 6 32956, at 11-12, 2008 WL 1840753 (D. Or. Apr. 21, 2008)).*

8 **DISCUSSION**

9 The parties have not addressed what law the court should apply
 10 in determining the enforceability of the forum selection clause.
 11 Judge Anna Brown of this court recently considered this choice-of-
 12 law issue, noting the circuits are split as to whether a federal
 13 court sitting in diversity should apply the law of the state
 14 designated in the contract, the law of the forum state, or federal
 15 common law. Judge Brown held that in the Ninth Circuit, "the
 16 enforceability of contractual forum-selection clauses is a matter
 17 of federal procedural law." *Indoor Billboard N.W. Inc. v. M2*
 18 *Systems Corp.*, ___ F. Supp. 2d ___, 2013 WL 486668, at *4 (D. Or.
 19 Feb. 6, 2013) (citing *Manetti-Farrow, Inc. v. Gucci America, Inc.*,
 20 858 F.2d 509, 513 (9th Cir. 1988)). Similarly, "[b]ecause

21
 22 *Orion cites *Premier Jets* for the proposition that the
 23 "question of contract rescission should be decided in [the] forum
 24 selected in [the] parties' agreement." Dkt. #19, p. 5. The
 25 *Premier Jets* holding was not as broad as Orion suggests. The court
 26 simply noted that questions regarding the interaction between the
 27 applicable statute "and the common law of contracts allowing
 28 rescission [would] likely need to be answered by whichever court
 resolves the merits of [the] dispute." 2008 WL 184-753, at *3.
 The court held the forum selection clause at issue was valid and
 binding, and dismissed the case for improper venue. *Id.* This is
 a far cry from holding that questions of contract rescission
 "should be decided in [the] forum selected in [the] parties'
 agreement."

1 enforcement of a forum clause necessarily entails interpretation of
2 the clause before it can be enforced, federal law also applies to
3 interpretation of forum selection clauses.'" *Id.* (quoting *Manetti-*
4 *Farrow*, 858 F.2d at 513). Here, however, the parties have not
5 asserted any disagreement regarding the meaning of the forum
6 selection clause. Their dispute involves only whether the clause,
7 the terms of which are clear and straightforward, should be
8 enforced.

9 In the Ninth Circuit, "forum selection clauses are prima facie
10 valid and should not be set aside unless the party challenging
11 enforcement of such a provision can show it is unreasonable under
12 the circumstances." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320,
13 325 (9th Cir. 1996) (internal quotation marks omitted; citing
14 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32
15 L. Ed. 2d 513 (1972)). The "unreasonable under the circumstances"
16 exception has been construed narrowly by the United States Supreme
17 Court. *Id.* In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92
18 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), the Court set forth factors
19 to be considered in determining whether a forum selection clause is
20 unreasonable. The *Argueta* court described these factors as
21 follows:

22 A forum selection clause is unreasonable if
23 (1) its incorporation into the contract was
24 the result of fraud, undue influence, or
25 overweening bargaining power, *Carnival Cruise*
26 *Lines [v. Shute]*, 499 U.S. [585,] 591, 111
27 S. Ct. [1522,] 1526[, 113 L. Ed. 2d 622
28 (1991)]; *Bremen*, 407 U.S. at 12-13, 92 S. Ct.
at 1914; (2) the selected forum is so "gravely
difficult and inconvenient" that the complain-
ing party will "for all practical purposes be
deprived of its day in court," *Bremen*, 407
U.S. at 18, 92 S. Ct. at 1917; or (3) enforce-
ment of the clause would contravene a strong

1 public policy of the forum in which the suit
2 is brought. *Id.* at 15, 92 S. Ct. at 1916. To
3 establish the unreasonableness of a forum
4 selection clause, [the complaining party has]
5 the "heavy burden of showing that trial in the
chosen forum would be so difficult and incon-
venient that the party would effectively be
denied a meaningful day in court." [Citation
omitted.]

6 *Argueta*, 87 F.3d at 325. The *Argueta* court noted that although
7 *Bremen* was "an admiralty case, its standard has been widely applied
8 to forum selection clauses in general." *Id.* (citations omitted).

9 WMP has not alleged that the forum selection clause was
10 incorporated into the Agreement due to fraud or undue influence,
11 and nothing in the record suggests this was anything other than an
12 arm's-length transaction between two commercial corporations with
13 equal bargaining power. WMP bases its arguments on the second and
14 third factors, arguing that forcing it to litigate in Kansas would
15 effectively deprive WMP of its day in court, and Oregon public
16 policy dictates that the trial be here.

17 Regarding WMP's claim that trying this case in Kansas would
18 effectively deprive WMP of its day in court, WMP's arguments mirror
19 those of the plaintiff in *Premier Jets, Inc. v. Honeywell Interna-*
20 *tional, Inc.*, 2008 WL 1840753 (D. Or. Apr. 21, 2008) (Haggerty,
21 CJ). There, as here, the plaintiff basically argued litigating in
22 the remote forum would be more expensive and inconvenient. The
23 court noted it was "unclear how added expense and inconvenience
24 would 'effectively deprive' [the plaintiff] of its day in court."
25 *Premier Jets*, 2008 WL 1840753, at *3 (citing *Crown Bev. Co. v.*
26 *Cerveceria Moctezuma, S.A.*, 663 F.2d 886, 888-89 (9th Cir. 1981)
27 (*per curiam*) "(affirming dismissal under forum selection clause
28 that forced a small company to litigate in a Mexican court)").

1 WMP's claim that it likely will be "unable to litigate this
2 matter in Kansas due to the unreasonable financial burden" also is
3 unpersuasive. WMP insists its many Oregon witnesses must be
4 present to testify in person, because "[t]elephone testimony of
5 these numerous witnesses . . . would deprive WMP of its day in
6 court." Dkt. #18, p. 3. WMP argues, "It is imperative for the
7 Court to view these individuals in person to understand the
8 technical nature of the claims at hand." *Id.* In today's
9 technological age, this argument is unpersuasive, at best. The
10 trial testimony of WMP's witnesses can be presented by means of
11 videotape, or perhaps even live by means of video conference if the
12 trial court has that capability. Either would allow the trier of
13 fact to evaluate the credibility of the witnesses, and "understand
14 the technological nature of the claims at hand."

15 The only public policy argument WMP advances is its assertion
16 that Oregon has more "connections" to this case than does Kansas.
17 WMP cites no case law, from any jurisdiction, to support its
18 argument that public policy dictates trying a lawsuit in the forum
19 with the greatest connections to the case. Indeed, "Oregon public
20 policy favors forum selection clauses that were freely negotiated."
21 *Harry & David v. J&P Acquisition*, 2009 WL 4892296, at *8 (D. Or.
22 Dec. 17, 2009) (Panner, J) (citing *Reeves v. Chem Industrial Co.*,
23 494 P.2d 729 (Or. 1972) "(finding that Forum selection clauses are
24 favored in Oregon, absent overreaching or fraud)").

25 WMP further argues Orion's alleged breach of the Agreement
26 allows WMP to rescind the Agreement in its entirety, including the
27 forum selection clause. The court agrees with Orion that this
28 argument puts the proverbial cart before the horse. Whether WMP

1 can rightfully rescind the Agreement is one of the questions that
2 must be decided in this case. Interpretation of the forum
3 selection clause is necessary to determine where the rescission
4 claim will be tried. See *Indoor Billboard*, 2013 WL 486668, at *4.

5 The court finds that the forum selection clause in the
6 Agreement is valid, binding, and enforceable. As a result, the
7 defendants' motion to dismiss for improper venue should be granted,
8 and this matter should be dismissed without prejudice.

9
10 **VII. SCHEDULING ORDER**

11 These Findings and Recommendations will be referred to a
12 district judge. Objections, if any, are due by **March 22, 2013**.
13 If no objections are filed, then the Findings and Recommendations
14 will go under advisement on that date. If objections are filed,
15 then any response is due by **April 8, 2013**. By the earlier of the
16 response due date or the date a response is filed, the Findings and
17 Recommendations will go under advisement.

18 IT IS SO ORDERED.

19 Dated this 4th day of March, 2013.

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21
22 /s/ Dennis James Hubel
23 Dennis James Hubel
24 Unites States Magistrate Judge
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